Supreme Court, U.S.
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No. 95-1438

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

THOMAS F. CURRY,
Petitioner,

v.

E-SYSTEMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the unpublished per curiam decision of the court of appeals correctly applied well-settled summary judgment standards to the particular facts of this case in affirming the trial court's decision to enter judgment against the petitioner on his age discrimination claim.

STATEMENT REQUIRED BY RULE 29.6

The parent company of respondent E-Systems, Inc. is Raytheon Company. E-Mass, Inc. is a nonwholly-owned subsidiary of E-Systems, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 29.6	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT	2
REASONS FOR DENYING THE WRIT	7
I. THIS CASE RAISES NO QUESTION UNDER *ST. MARY'S HONOR CENTER v. HICKS*, BECAUSE THE COURT OF APPEALS' DECISION MAKES CLEAR THAT CURRY COULD NOT PREVAIL EVEN UNDER HIS OWN INTERPRETATION OF THAT CASE	7
II. THE COURT OF APPEALS' HIGHLY FACT-SPECIFIC DECISION WAS CORRECTLY DECIDED AND HAS NO SIGNIFICANCE BEYOND THE CONFINES OF THIS LITIGATION	8
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986)	9
Barbour v. *Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. dismissed*, 116 S. Ct. 1037 (1996)	8
Binder v. *Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995)	8
Birkbeck v. *Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir.), *cert. denied*, 115 S. Ct. 666 (1994)	10
DeMarco v. *Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993)	8
EEOC v. *Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992)	10
EEOC v. *Western Electric Co.*, 713 F.2d 1011 (4th Cir. 1983)	10
Gustovich v. *AT&T Communications, Inc.*, 972 F.2d 845 (7th Cir. 1992)	11
Holder v. *City of Raleigh*, 867 F.2d 823 (4th Cir. 1989)	11
Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986)	9
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	4
O'Connor v. *Consolidated Coin Caterers Corp.*, —— S.Ct. ——, 1996 WL 142564 (U.S. Apr. 1, 1996)	4
Palmer v. *United States*, 794 F.2d 534 (9th Cir. 1986)	10
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989)	10
Rush v. *McDonald's Corp.*, 966 F.2d 1104 (7th Cir. 1992)	10
St. Mary's Honor Center v. *Hicks*, 509 U.S. 1042 (1993)	2, 7
Sheridan v. *E.I. duPont de Nemours & Co.*, 74 F.3d 1439, *opinion vacated on grant of reh'g en banc*, 74 F.3d 1459, 1996 WL 135060 (3d Cir., Feb. 28, 1996)	8
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981)	4
United States v. *Johnston*, 268 U.S. 220 (1925)	9

TABLE OF AUTHORITIES—Continued

Statutes	Page
Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634	4
Rules	
Fed. R. Civ. P. 56(e)	8-9
Fourth Circuit Internal Operating Procedure 36.4	9
Fourth Circuit Internal Operating Procedure 36.6	9
Other Authority	
R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (7th ed. 1993)	8

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent E-Systems, Inc. ("E-Systems" or "the Company") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the unpublished per curiam decision of the United States Court of Appeals for the Fourth Circuit.

This case involves nothing more than the straightforward application of this Court's settled summary judgment standards to the particular evidence adduced in the litigation. The court of appeals unanimously affirmed the district court's entry of summary judgment against petitioner Thomas F. Curry ("Curry") on his age discrimination claim, because the evidence was insufficient to permit a reasonable factfinder to conclude either that E-Systems' asserted reason for terminating Curry's employment—that changed business conditions necessitated a change in the organization's focus, and Curry's skills were not as com-

patible with the new focus as were those of other employees—was untrue, or that the real reason for the termination was Curry's age. This determination has no significance beyond the confines of this specific litigation, a fact that the court of appeals recognized when it concluded there was no need even to publish its opinion.

The case does not present any question under *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 1042 (1993), as Curry contends. He argues that under *Hicks*, he was entitled to a trial if, in addition to establishing a *prima facie* case of discrimination, he adduced sufficient evidence that E-Systems' asserted reason for discharging him was false—even absent any evidence that the real reason for the decision was his age. Pet. App. 4-6.[1] Curry clearly could not prevail even under his own proposed standard, however, because the court of appeals concluded that the evidence he proffered to cast doubt on the credibility of the Company's stated reason did not suffice to create any genuine issue for trial.

The remaining issues that Curry raises simply go to the sufficiency of the evidence and are not worthy of this Court's plenary consideration. And, in all events, the court of appeals' decision is correct. The petition should be denied.

COUNTERSTATEMENT

E-Systems develops and produces electronics systems and products. Much of its business is generated from defense-related contracts with the Federal Government. Pet. App. 2a; J.A. 47. Curry was hired in 1983 to work as a scientist in an E-Systems unit called the Center for Advanced Planning and Analysis ("CAPA"). During the 1980s CAPA functioned as a corporate "think tank," and the work of its professional staff, including Curry, was

[1] "Pet. App." refers to the appendix to the petition for writ of certiorari. "J.A." refers to the Joint Appendix filed in the court of appeals.

highly theoretical and research oriented. Pet. App. 2a; J.A. 53, 75.

In 1990, due to changes in the defense industry, E-Systems conducted the first of several layoffs in CAPA. Some employees were transferred and others discharged. Pet. App. 2a. A second layoff occurred in 1993. At that time, CAPA had only eight professional staff members, all over age 45. Four of the eight—including Curry (age 66)—were 60 or older, and only one was younger than 54. *Id.*[2]

The 1993 layoff was prompted by the decision of Eaton Adams (age 63), E-Systems' Vice President for Strategic Planning, to merge CAPA into another segment of the Company called Government and International Operations ("GIO"). The new GIO was to focus primarily on business development, and the organization that had been CAPA, which would be called Studies and Analysis, would move away from the sophisticated technical studies that had been the unit's principal focus. *Id.* at 3a; J.A. 89-91, 93, 98.

Once the new business plan was established, the Vice President of GIO, William McClain (age 59), reviewed the work that the CAPA professionals had been doing. On that basis, he and Adams decided that Curry and Sam Hubbard (age 63) would be laid off. Curry was selected for layoff because his work primarily had been non-critical work of a highly sophisticated, technical nature—the sort of work that Adams had determined GIO would no longer emphasize. Pet. App. 3a; J.A. 52-53, 97-99, 100-102.

A third reorganization precipitated by changing business conditions occurred about one year later. In Spring

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[2] In addition to Curry, the professional members of CAPA were: Sam Hubbard (63), Phillip Dickinson (60), James Mitchell (60), Robert DiPalma (57), Malcolm Uffelman (57), William Butz (54), and Thomas Milbourne (46). Pet. App. 2a.

1994, E-Systems announced that the entire Studies and Analysis function would be disbanded. Pet. App. 3a-4a; J.A. 48.

Curry sued E-Systems, alleging that he was terminated in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA"). The United States District Court for the Eastern District of Virginia granted E-Systems summary judgment on alternative grounds. Applying this Court's familiar *McDonnell Douglas* burden-shifting scheme,[3] the district court held that Curry was unable to establish a *prima facie* case of age discrimination, Pet. App. 17a, and that, in any event, he had failed to raise a genuine issue as to whether E-Systems' "proffered reason for the layoff was merely pretextual," *id.* at 19a.[4] The district court also held that Curry could not prevail under traditional proof principles, because he had failed to adduce sufficiently probative direct or indirect evidence of discrimination. *Id.* at 17a-18a.

The court of appeals affirmed. The court assumed without deciding that Curry could establish a *prima facie* case of discrimination under the *McDonnell Douglas* framework. Pet. App. 6a.[5] It also determined that

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[3] Under that scheme, the plaintiff has an initial burden of proving a *prima facie* case. A burden of production then shifts to the employer to state a legitimate, nondiscriminatory reason for the challenged employment decision. Once the employer does so, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981). *Accord McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973).

[4] Curry's assertion that the district court did not reach the pretext issue, Pet. App. 4, is plainly incorrect, as the Fourth Circuit noted, Pet. App. 4a.

[5] Because the court of appeals assumed, without deciding, that Curry had established a *prima facie* case, this case does not raise the question which this Court addressed in *O'Connor* v. *Consolidated*

E-Systems had proffered a legitimate, nondiscriminatory reason for Curry's discharge: CAPA's functions "were being phased out as part of an economically-forced redirection of E-Systems' operations," and Curry's "specific skills were deemed by management not to be as compatible with the company's refocused operations as were those of others." *Id.* at 6a-7a, 11a.[6] Thus, the court observed, to survive summary judgment Curry would have to "present genuine issues of fact both as to whether E-Systems' proffered reason was false *and* whether the real reason was discrimination because of Curry's age." *Id.* at 8a (emphasis in original). It concluded that Curry could do neither.

The court of appeals began by addressing the fact that the two oldest professionals in CAPA, Curry and Hubbard, were selected for layoff. This fact was not entitled to significant weight, the court reasoned, because the age differential between the individuals who were terminated and those who were retained was insubstantial, and because a group of only eight employees is too small to permit any reasonable inferences concerning the employer's motive. *Id.* at 9a-11a.

Next, the court considered Curry's allegation that, when he told E-Systems' Chairman of the Board that he was laid off because the Company was no longer interested in his projects, the Chairman answered, "[t]hat's bull—,"

Coin Caterers Corp., 1996 WL 142564 (U.S. Apr. 1, 1996). Accordingly, *O'Connor* has no bearing on the petition.

[6] In the court of appeals, Curry argued that E-Systems failed to produce admissible evidence of a legitimate, nondiscriminatory reason for Curry's discharge because one of the decisionmakers, Adams, had died and deposition testimony concerning his out-of-court statements was inadmissible hearsay. Brief of Appellant at 25-27. The Court of Appeals rejected this argument, both because McClain had participated in the decision and thus testified with personal knowledge, and because Adams' statements were not offered to prove their truth or correctness. Pet. App. 7a. Curry does not renew his evidentiary argument before this Court.

and that when he told a member of the Company's Executive Board of Directors about his termination, the Director asked him his age and said, "Damn, Tom, * * * it's time to hang it up." Pet. App. 2a. These isolated comments were not probative, according to the court, because the individuals who made them were not involved in the decision to discharge Curry, and because there was no evidence that they had been told of the reason for the decision by those who did make it. *Id.* at 11a.

The court of appeals then considered and rejected as insufficient the remaining evidence that Curry offered to "draw in question the truth of E-Systems' " asserted reason for his termination. *Id.* First, although Curry claimed that CAPA's focus did not change after his discharge and that work on his projects was continued by others, the court observed that the undisputed evidence showed the contrary: much of Curry's work was canceled, only a few of his projects were carried through to their completion, and what remained of CAPA was being completely disbanded. *Id.* at 11a-12a. Second, the court reasoned, Curry's claim that he was better qualified than retained CAPA employees to perform the work of the new organization was supported by nothing but Curry's own self-serving appraisals; moreover, even if E-Systems' evaluation of his abilities was mistaken, "poor business judgment * * * of course is not actionable as employment discrimination." *Id.* at 12a-13a. And third, far from proving age bias, Curry's claim that E-Systems refused to retain him as an unpaid consultant served only to bolster the Company's contention that his work was no longer needed. *Id.* at 13a.

REASONS FOR DENYING THE WRIT

I. THIS CASE RAISES NO QUESTION UNDER *ST. MARY'S HONOR CENTER* v. *HICKS*, BECAUSE THE COURT OF APPEALS' DECISION MAKES CLEAR THAT CURRY COULD NOT PREVAIL EVEN UNDER HIS OWN INTERPRETATION OF THAT CASE

Curry asks this Court to review the court of appeals' decision to resolve an alleged circuit conflict concerning the evidence a plaintiff must adduce to overcome summary judgment in an employment discrimination case. Pet. App. 5-9. Consistent with this Court's holding in *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 1042 (1993), the court of appeals stated that, to survive summary judgment under the *McDonnell Douglas* framework, Curry would have to "present genuine issues of fact both as to whether E-Systems' proffered reason [for his discharge] was false *and* whether the real reason was [age] discrimination." Pet. App. 8a (emphasis in original). *See Hicks*, 509 U.S. 1042, ——, 113 S. Ct. at 2752 (plaintiff in discrimination case must prove "*both* that the [employer's] reason was false, *and* that discrimination was the real reason") (emphasis in original). Curry argues that at summary judgment, *Hicks* requires a plaintiff only to produce sufficient evidence showing the falsity of the employer's asserted reason (together with a *prima facie* case), and that proof of unlawful bias is unnecessary. Pet. App. 5-6. Curry's proposed standard is of no help to him, however, because the court of appeals' decision makes clear that he cannot satisfy it.

The court of appeals considered in detail each item of evidence that Curry offered to prove that E-Systems' asserted reason for his discharge was unworthy of credence. *See* Pet. App. 9a-13a. It determined that none of the evidence was sufficiently probative to create a genuine issue as to either of two material facts: whether "E-Systems' asserted reason was a false one," and whether "age-

discrimination was the real reason for Curry's discharge." *Id.* at 9a. Because the court of appeals concluded that Curry's evidence of falsity was inadequate, its judgment for E-Systems clearly would have been the same even had it adopted the legal standard Curry advocates.

It is well established that certiorari review is unwarranted where, as here, the issue on which review is sought is irrelevant to the outcome of the case. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 172-173 (7th ed. 1993) (citing authorities). Thus, even assuming that the alleged conflict to which Curry points were otherwise ripe for this Court's consideration,[7] it would provide no basis for granting review in this case.

II. THE COURT OF APPEALS' HIGHLY FACT-SPECIFIC DECISION WAS CORRECTLY DECIDED AND HAS NO SIGNIFICANCE BEYOND THE CONFINES OF THIS LITIGATION

Curry does not dispute the settled summary judgment standards that govern this case. Pet. App. 9a. There is no question that summary judgment should be denied only when the nonmoving party "set[s] forth specific facts showing that there is a genuine issue for trial." Fed. R.

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[7] Although it is not necessary to our argument, we note that several of the cases Curry cites, Pet. App. 9, do not demonstrate the existence of a clear circuit conflict. Two are not summary judgment cases. *See Binder* v. *Long Island Lighting Co.*, 57 F.3d 193 (2d Cir. 1995); *Barbour* v. *Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. dismissed*, 116 S. Ct. 1037 (1996). In *DeMarco* v. *Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993), the Second Circuit simply restates the holding of *Hicks* in the context of deciding the unrelated question whether application of the ADEA to parochial schools violates the Establishment Clause. *Id.* at 170. The Third Circuit's opinion in *Sheridan* v. *E.I. duPont de Nemours & Co.*, 74 F.3d 1439 (3d Cir. 1996), follows the standard Curry advocates while sharply criticizing it, *id.* at 1448-1451, and has been vacated pending rehearing *en banc*, *see* 74 F.3d 1439, 1459, 1996 WL 135060 (3d Cir., Feb. 28, 1996).

Civ. P. 56(e). A mere scintilla of evidence in support of the nonmoving party's case will not suffice; rather, a genuine issue is raised only by evidence that would permit a reasonable jury to return a verdict in the nonmoving party's favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986).

The only issue presented here is whether the court of appeals correctly applied these well-settled standards to the particular facts adduced in the litigation. Curry claims that he raised a genuine factual issue as to whether E-Systems' stated reason for terminating his employment was false; the court of appeals concluded that he did not. As this Court held long ago, certiorari is not granted "to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925).

That nothing more is at issue in this case is confirmed by the court of appeals' determination that its per curiam opinion did not even warrant publication. The Fourth Circuit publishes an opinion if

> (i) It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or (ii) It involves a legal issue of continuing public interest; or (iii) It criticizes existing law; or (iv) It contains a historical review of a legal rule that is not duplicative; or (v) It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit. [Fourth Circuit Internal Operating Procedure 36.4.]

Because the opinion below is unpublished, it has no precedential weight. *Id.* 36.6. The Fourth Circuit's disposition of the case, as that court recognized, is of moment only to the particular litigants before it. It presents no issues of broader significance justifying expenditure of this Court's limited resources on certiorari.

In any event, the court of appeals' decision is clearly correct. Before this Court, Curry chiefly relies on the two

alleged comments by members of E-Systems' management as proof that the Company's stated reason for its decision was untrue. Pet. App. 6. As the court of appeals concluded, however, these comments (even assuming they were made) are irrelevant to the issue of E-Systems' motive, because it is undisputed that the speakers played no role whatsoever in the decision to terminate Curry's employment, and there was no evidence that either had spoken to Adams or McClain about the basis for the decision. Pet. App. 11a. *See, e.g., Rush* v. *McDonald's Corp.*, 966 F.2d 1104, 1116 (7th Cir. 1992) (remarks by nondecisionmakers "not probative of discrimination"); *EEOC* v. *Clay Printing Co.*, 955 F.2d 936, 942-943 (4th Cir. 1992) (plaintiff must establish "nexus" between alleged statements and adverse employment decision). *See also Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring in judgment) ("statements by nondecisionmakers" are not direct evidence of discriminatory motive). Thus, far from constituting "direct evidence of pretext," as Curry claims, Pet. App. 6, these isolated remarks are not at all probative of the material issues in the case.

The court of appeals also properly rejected Curry's other evidence. That the two oldest of eight professional CAPA employees were selected for layoff is not probative for two reasons: All of the employees were close in age and "well on the high-side of the normal life expectancy range," Pet. App. 10a; *see, e.g., EEOC* v. *Western Elec. Co.*, 713 F.2d 1011, 1016 (4th Cir. 1983) (no proof of discrimination where employees considered for demotion were "very close in age"), and a group of only eight employees is simply too small to permit any meaningful inference, *see, e.g., Birkbeck* v. *Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir.), *cert. denied*, 115 S. Ct. 666 (1994); *Palmer* v. *United States*, 794 F.2d 534, 539 (9th Cir. 1986).

Curry's claims that E-Systems continued working on his projects and that CAPA's focus did not change after his

termination are not supported by the record. The latter claim, as the court of appeals observed, is belied by the undisputed fact that what remained of CAPA after the merger with GIO was being completely disbanded. Pet. App. 12a. As to the former, Curry points to only two projects, "Constellation" and "GPS," that he claims E-Systems continued, Pet. App. 7 n.9, but he conceded in his deposition that most of his time in the six months preceding his discharge was spent on projects that were not pursued. Pet. App. 12a; J.A. 55-63. Given this concession, the court of appeals correctly concluded that "the inevitable carry-through to completion of some few projects" did not cast doubt on E-Systems' explanation for Curry's discharge. Pet. App. 12a.

As the court of appeals recognized, Curry's evidence that his "marketing expertise was well-suited to the new focus [of] CAPA," Pet. App. 7, was also insufficient because it was based on his own self-serving characterization of his abilities. Pet. App. 12a. That characterization was inconsistent with Curry's admission in deposition that his work at E-Systems had always been theoretical and research-oriented. J.A. 53. And even if the Company did misjudge his skills, mistaken business judgment does not equate with either deceitfulness or intentional discrimination. *See, e.g., Gustovich* v. *AT&T Communications, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992); *Holder* v. *City of Raleigh*, 867 F.2d 823, 829 (4th Cir. 1989).

Finally, the court of appeals correctly held that E-Systems' refusal to retain Curry "as an unpaid consultant," Pet. App. 7, confirmed, rather than undermined, the Company's assertion that Curry's work was no longer needed. Because Curry failed to create any genuine issue for trial either as to the veracity of E-Systems' stated reasons for his discharge, or as to whether the decision was in reality motivated by his age, the Fourth Circuit's ruling was plainly correct and does not warrant this Court's review.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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